Supreme Court, U.S.
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In The

Supreme Court of the United States

October Term 1997

U.S. SUPPLY COMPANY, INCORPORATED,
Petitioner,

v.

APEX PLUMBING SUPPLY, INCORPORTED; HAROLD FALCHICK,
Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

Petition for Writ of Certiorari

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QUESTIONS PRESENTED

1. Did the Court of Appeals err when they declined to apply United Steelworkers of America v. Enterprise Wheel & Car Corp. after they found that a commercial arbitrator materially departed from the contract by applying a remedial standard of inventory valuation radically different from what the parties agreed to?

2. Did the Court of Appeals err when they recognized that the commercial arbitrator gave duplicate credits for the same goods (pre-auction value plus post-auction proceeds) and then declined to acknowledge that duplicate credits are an "evident miscalculation of figures" or "an evident material mistake in the description of . . .property referred to", requiring reversal under 9 USC Section 11(a)?

3. Did the Court of Appeals err when they found that the venue provisions of Section 9 of the Federal Arbitration Act were permissive and therefore preempted the venue language of FAA Sections 10 and 11, which denied the petitioner the opportunity to subpoena the arbitrator and his records?

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PETITION FOR WRIT OF CERTIORARI

U. S. Supply Co., Inc., respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fourth Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App. 1, infra) is reported at 142 F.3d 188 (4th Cir. 1998). We have conducted a thorough search for citations to the opinions of the district court. Such citations could not be found, hence we conclude that the district court opinions are unreported. The district court issued an opinion as to jurisdiction and venue (App. 21), and on the merits (App. 13).

JURISDICTION

The court of appeals entered its judgment on April 22, 1998. On May 19, 1998 it denied the petitioners request for rehearing (App. 28).

The jurisdiction of this Court is invoked under 28 U.S.C. Section 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

9 USC Section 9 provides:

> "If the parties in their agreement have agreed that a judgment of the court shall be entered upon the award made pursuant to the arbitration, and shall specify the court, then. . . any party to the arbitration may apply to the court so specified for an order confirming the award, and thereupon the court must grant such an order unless the award is vacated, modified,

> or corrected as prescribed in sections 10 and 11 of this title. If no court is specified in the agreement of the parties, then such application may be made to the United States court in and for the district within which such award was made. . .

9 USC Section 10(a)(4) provides:

> "In any of the following cases the United States court in and for the district wherein the award was made may make an order vacating the award upon the application of any party to the arbitration...
>
> Where the arbitrators exceed their powers, or so imperfectly executed them that a mutual, final, and definite award upon the subject matter submitted was not made."

9 USC Section 11 similarly provides that "the United States court in and for the district wherein the award was made" may modify an arbitration award:

> "where there was an evident miscalculation of figures or an evident material mistake in the description of any person, thing, or property referred to in the award."

STATEMENT OF THE CASE

U. S. Supply and Apex Plumbing Supply made a contract in December, 1994 that U. S. Supply would manage Apex's business for one year; the agreement contained an option to purchase after six months. During 1995 U. S. Supply advanced inventory and cash to run the business, then exercised the option to purchase. Negotiations over some

terms broke down and U. S. Supply filed for commercial arbitration in Philadelphia as provided for in the agreement.

The arbitrator heard evidence, then determined that U. S. breached the purchase option; he found that Apex owed U. S. Supply $104,381 for inventory and cash advances during 1995. The arbitrator then offset the Apex debt by giving Apex credits for the April 24, 1996 FIFO value of stale Apex inventory (over a year old), together with the auction proceeds ($9,000) from the auction sale of that very same inventory. The arbitrator made other credit and debit adjustments not material here, and entered a net award in favor of Apex in the amount of $179,284.

Two facts are undisputed:

First, the arbitrator disregarded the inventory valuation formula the parties agreed to in contract paragraph 6[1], and substituted a FIFO ("first in-first out") valuation, which resulted in the inclusion of inventory over one year old, which

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[1] "6. Option to purchase: At any time following the expiration of six months from the date U. S. Supply commences its management activities, U. S. Supply shall have the option to purchase all of the assets of Apex, including all its inventory, equipment, trade fixtures, intellectual property, including trademarks, copyrights, tradenames and the like, accounts receivables and any and all other tangible and intangible assets of Apex. The price shall be determined as follows:

1. Inventory which turns every 120 days shall be valued at the best price paid by U. S. Supply; inventory which turns every 240 days shall be valued at 50% of the best price; inventory which turns every 360 days shall be valued at 25% of the best price. Inventory that does not turn at least once per year shall have no value in the purchase price. Display items in new saleable condition shall be valued at 60% of the best price, and it is agreed that the total aggregate amount to be paid for such display item inventory shall not exceed Thirty Six Thousand ($36,000) Dollars, no matter the amount of inventory on hand, or the actual cost of same. (Emphasis added)."

is in contravention of the clear terms of sale laid out in the agreement.

Second, the arbitrator gave a duplicate credit for the same inventory, once at the stale FIFO cost of $258,446 and once as the auction sale proceeds of $9,000.

U. S. Supply filed a petition to vacate or modify the award in the local Pennsylvania courts, which was removed to the District Court for the Eastern District of Pennsylvania on diversity grounds. A day after U. S. Supply filed its petition, Apex filed a petition to confirm in the District Court for the Southern District of Maryland. Since the Southern District docket moves faster than the Eastern District of Pennsylvania docket, the Maryland Court issued its opinions and orders on jurisdiction, venue and the merits first, and the Eastern District demurred by dismissing U. S. Supply's petition without prejudice.

The Fourth Circuit panel affirmed the District Court's confirmation of the award, and refused rehearing en banc.

REASONS FOR GRANTING THE WRIT

The Fourth Circuit has apparently decided to ignore that body of law providing for review of arbitration awards, no matter how blatant the injustice, or how flagrant the departure from the contract terms.

In their stance, the Fourth Circuit is at odds with this Court, the expressed wish of Congress (Sections 10 and 11 of the Federal Arbitration Act), and the review procedures followed in other circuits.

Clearly, when parties agree to an unequivocal empirical valuation formula, the arbitrator's award is not legitimate when he substitutes a materially different formula. Here the parties agreed that inventory would be valued at a percentage of its current purchase cost, depending on its age, with inventory over a year old deemed valueless. Obviously, the intent of the parties was to value only recently-purchased saleable inventory, not obsolete goods that were demonstrably

non-saleable. See paragraph 6 of the contract. The arbitrator disregarded this crucial valuation provision and computed the inventory valuation on a FIFO[2] formula, which is the reported cost to Apex of goods that were acknowledged to be over a year old, and demonstrably non-saleable, for they only brought $9,000 at auction three weeks after the arbitrator's valuation date. Obviously, the arbitrator had a different agenda than the parties intended, and he implemented his private agenda rather than follow the contract terms. This is exactly the kind of award that Justice Douglas was writing about when he said that an arbitrator does not sit to dispense his own brand of justice.

The simplest way for this Court to dispose of this case in a fair manner would be to grant certiorari, reverse the judgment of the Court of Appeals, quoting Justice Douglas, and the other applicable cases cited by U. S. Supply, then remand for referral to the district court for the Eastern District of Pennsylvania to conduct review in accordance with United Steelworkers v. Enterprise Wheel & Car Corp., 363 U. S. 593, 4 L. Ed. 2d 1424 (1960), and Sections 10 and 11 of the FAA. Hopefully that would admonish the Court of Appeals that the review provisions of the Federal Arbitration Act should be implemented in the Fourth Circuit like they are elsewhere.

The Fourth Circuit's affirmance of the District Court's assumption of jurisdiction and venue raises a different kind of problem. Here U. S. Supply petitioned to vacate or modify the award, and the petition was removed to the Eastern District of Pennsylvania. Apex filed a later petition to confirm (under FAA section 9) in the Southern District of Maryland, so the Pennsylvania court deferred to Maryland. Although a hearing was held in the Southern District of Maryland, U. S. Supply could not subpoena the arbitrator and his records to explore the crucial valuation issue. Federal Rule 45 limits subpoenas to

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[2] "First In, First Out", which has nothing to do with the age of inventory. In fact, this formula does exactly the opposite of what the parties agreed to; FIFO values the oldest inventory at its cost, regardless of how old or obsolete it is.

100 miles, and Greenbelt, Maryland is more than 100 miles from Philadelphia. U. S. Supply has materially fewer litigation tools in southern Maryland than it has in Philadelphia.

ARGUMENT

I. Valuation of Inventory over a year old, in violation of the contract's plain language remedial provision.

The Fourth Circuit confirmed the arbitration award in deliberate disregard of the review provisions of the Federal Arbitration Act, Sections 10 and 11, and this Court's opinion in United Steelworkers of America v. Enterprise Wheel & Car Corp., 363 U. S. 593, 4 L. Ed. 2d 1424 (1960), which says:

> "Nevertheless, an arbitrator is confined to interpretation and application of the . . . agreement; he does not sit to dispense his own brand of . . . justice....yet his award is legitimate only so long as it draws its essence from the . . . agreement. When the arbitrator's words manifest an infidelity to this obligation, courts have no choice but to refuse enforcement of the award."

followed in Coast Trading v. Pacific Molasses, 681 F. 2d 1195 (1982), Swift Industries v. Botany Industries, 466 F. 2d 1125 (CA3, Pa, 1972) and Totem Marine Tug & Barge v. North Am. Towing, 607 F. 2d 649 (CA 5 La 1979). The Fourth Circuit titled Section B. of their opinion "Valuation of Inventory Over One Year Old", then acknowledged that the arbitrator departed from the contract terms.(App. 8,9). They inextricably characterized U. S. Supply's argument as having been raised in front of them for the first time ("Courts of Appeals are precluded from engaging in de novo review of a confirmation of an arbitration award. Parsons & Whittemore v. Yeargin Const. Co., Inc, 744 F. 2d 1482, 1484 (11th Cir.

1984)"); this is simply not true. U. S. Supply raised the twin issues of non-contractual valuation formula and duplicate credits in every court proceeding at every level.

The Fourth Circuit passed off the arbitrator's unlawful valuation decision by saying:

> "U. S., not unexpectedly, counters that here more than a mere "misinterpretation" of the contract has transpired because the arbitrator's valuation decision irrationally disregarded an unambiguous provision of the Agreement. Even if we were to accept the premise of U.S.'s assertion, however, no precedent supports vacation on this ground; indeed, U. S. cites none." (App. 11).

U. S. Supply cited and quoted United Steelworkers of America v. Enterprise Wheel & Car Corp., supra, Coast Trading v. Pacific Molasses, supra, Swift Industries v. Botany Industries, supra, and Totem Marine Tug & Barge v. North Am. Towing, supra in their brief. The Fourth Circuit panel simply misrepresented what was going on in front of them.

Clearly the Fourth Circuit has adopted a policy of not reviewing arbitration awards, no matter how flagrant the arbitrator's abuse. Equally clearly, this Court has adopted the notion that the arbitral forum is a favored method of resolving disputes, and that all complaints about its shortcomings are meritless because the review provisions set forth in the Federal Arbitration Act safeguard litigants from flagrant arbitral abuse (see Wilko v. Swan, 346 U. S. 427, 98 L. Ed. 168, 74 S. Ct. 182 (1953), Mitsubishi Motors v. Soler Chrysler-Plymouth, 473 U. S. 614, 87 L. Ed. 2d 444, 105 S. Ct. 3346 (1985), Gilmer v. Interstate/Johnson Lane Corp., 500 U. S. 20 (1991), etc). Also this Court said in United Steelworkers of America v. Enterprise Wheel & Car Corp., supra. that arbitrators were not at liberty to substitute their judgment for the parties' contract terms. However, where a Circuit Court of Appeals

says it will not review arbitral awards, even where everyone agrees that the arbitrator broke from a clear, material, remedial contract standard the parties agreed to, as here, there is no review and the arbitration process loses its integrity and fundamental fairness. The reasoned decisions of this Court are meaningless when the Court of Appeals elects not to follow them.

This Court has not visited the fundamentals of commercial arbitration for many years[3]. Recent cases, such as Gilmer, supra, Mitsubishi, supra, Sherk, supra and particularly Shearson/American Express, Inc. v. McMahon, 482 U. S. 220, 96 L. Ed. 2d 185, 107 S. Ct. 2332 (1987) endorse arbitration as a favored forum, even in the face of suspicion that arbitrators may "dispense their own brand of justice", because FAA review theoretically safeguards litigants:

> "Finally, we have indicated that there is no reason to assume at the outset that arbitrators will not follow the law; although judicial scrutiny of arbitration awards necessarily is limited, such review is sufficient to ensure that arbitrators comply with the requirements of the statute. Shearson/American Express, Inc. v. McMahon, 482 U. S. 220, 96 L. Ed. 2d 185 at page 197. (1987)."

The case presents the Supreme Court with an opportunity to remind aberrant circuits (like the Fourth Circuit) that Congress intended them to enforce all of the provisions of the Federal Arbitration Act, not just the referral provision. Patent illegality in an award must be reversed as surely as arbitrability should be enforced, or else "such review" is insufficient to ensure that arbitrators comply with the statute.

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[3] As opposed to the arbitration of employment disputes involving substantive rights under Title VII, ADEA, ADA and like matters.

II. Duplicate Credits; the "evident miscalculation of figures", or "evident material mistake in the description of . . . property".

Next, the Fourth Circuit clearly noted in their recitation of the facts that the arbitrator gave Apex two credits for the same goods, one credit for its inventory at the erroneous valuation of $258,446 on April 24, 1996, and a duplicate credit for the auction proceeds of this same inventory ($9,000)[4].(App. 3). Although the Fourth Circuit described the duplicate credits, they declined to modify the award because they said that the duplicate credits they described after looking over the award did not appear on the face of the award, as required by Section 11 of the FAA. This is not true. Section 11 of the FAA talks about "evident miscalculations" and "evident material mistake"(s), not matters that appear on the face of the award. Simply put, the Fourth Circuit could not have described the duplicate award numbers unless they were "evident". Double-charging U. S. Supply is a "misdescription of property" or "miscalculation of figures" in the form of a mathematical error which appears "evident". The Fourth Circuit found it by looking at the award; therefore, it must be evident.

The reason the duplication is so hard to miss is that the inventory auction (which brought $9,000) was held just a few weeks after April 24, 1996, the date when the arbitrator said the inventory was worth $258,446. $258,446 worth of plumbing inventory does not lose nearly a quarter million dollars in value in a matter of weeks.[5] The inventory value was arbitrarily inflated so the arbitrator could transfer money from U. S. Supply to Apex. In fact, the arbitrator simply dispensed his idiosyncratic brand of justice and utilized

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[4] The auction was held three weeks after the close of business on April 24, 1996.

[5] This is about the first question anyone would ask the arbitrator if given a chance to examine him.

inventory valuation as the vehicle for doing exactly what he pleased.

Again, if arbitration is remain a credible forum for dispute resolution, the review provisions of the Federal Arbitration Act must be enforced.

In this case the Supreme Court need not necessarily entertain full briefing and argument. The arbitral abuse in this phase of the case is admitted and so flagrant that granting certiorari, followed by simple reversal with a pointed cite to the language of Justice Douglas, Sections 10 and 11 of the Federal Arbitration Act and Swift Industries v. Botany Industries, supra, should suffice to make the point that our courts are obligated to enforce the will of Congress by following all the provisions of the Federal Arbitration Act, including most pointedly, the review provisions.

III. Jurisdiction and Venue as a way of denying out-of-state parties essential litigation tools.

The Fourth Circuit considered the jurisdiction and venue issues more interesting than U. S. Supply's review request. They found that the jurisdiction and venue provisions of Section 9 are permissive, not mandatory.

They missed the point.

Section 9 of the FAA does not treat modification, vacation and remand of arbitration awards; it treats confirmation of awards which have not been modified, vacated, etc. under Sections 10 or 11.

Throughout, U. S. Supply has argued that Sections 10 and 11 are the operative sections which vest jurisdiction and venue to vacate and modify the award in the district court where the award was rendered, simply because that is what those sections say in plain English, and for various sound policy reasons (referral back to the arbitrator for clarification, subpoena power, situs of the evidence, choice of the parties).

In this case, the Southern District of Maryland was actually the later-filed forum, but it held on to the case simply

by acting quicker than the Eastern District of Pennsylvania. No matter what the Fourth Circuit and the Southern District Court said about consideration on the merits under Sections 10 and 11, they did no review.

It is important to distinguish between Section 9 and Sections 10 and 11 of the FAA.

Section 9 allows confirmation petitions to be filed anywhere there is jurisdiction, according to the Fourth Circuit. However, the Fourth Circuit never discussed the language of Sections 10 and 11, which grammatically vests review power in the district where the award was rendered:

> "In any of the following cases the United States court in and for the district wherein the award was made may. . . ."

If FAA review provisions are meaningful, then they should be effected in the forum where review can be done most effectively. U. S. Supply was precluded from ever calling the arbitrator to the stand to explain his departure from the contract; the arbitrator was beyond the subpoena power of the Southern District of Maryland, and neither his notes nor his testimony could be explored by review and cross-examination. It is important to note here that despite the presence of a written award, the issue of why the arbitrator ignored the parties's valuation method and substituted his own is not explained, as a judge would be required to do in a written opinion.[6] It would have been informative to hold the review process in the Eastern District so that the arbitrator could have

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[6] The commercial arbitration rules of AAA do not permit an arbitrator to re-visit an award, except with the consent of both parties. Consequently, unlike nearly every other court proceeding, there is no opportunity for reconsideration by the decision-maker. Once the decision is in, right or wrong, neither the parties nor the arbitrator ever have the opportunity to address irregularities, inconsistencies, or mistakes of fact or law.

been subpoenaed to explain his radical departure from the contract.

The foregoing is a process argument, going to the fairness of venue which effectively cuts a party off from the presentation of informative evidence. In the search for the truth, the right to compel the production of relevant evidence remains one of the most important procedural rights in our dispute resolution system. Indeed, one of the primary arguments contra the arbitrability of Title VII, ADEA, ADA and like disputes is that the process protections are not available to the parties in arbitration, and arbitration is therefore fundamentally deficient as a forum for the resolution of such disputes. The same argument is applicable to the venue resolution reasoning of the Fourth Circuit here. While venue under Section 9 may be considered discretionary, other considerations come into play in determining whether a party was deprived of a significant right in the review process, and one of them is the subpoena power.

Perhaps more important is the phrasing of Sections 10 and 11. They simply state that vacating and modifying arbitration awards may be done by the district court in the district where the arbitration occurred. Obviously this provision was written because it was presumed that all of the evidence, and at least one of the parties would be in that district, so that the parties could put their best case before the reviewing court.

In Sherk v. Alberto-Culver Co., 417 U. S. 506, 41 L. Ed. 2d 270 (at 279), 94 S. Ct. 2449 (1974) the Supreme Court held that an international dispute should be referred to arbitration. One of the reasons was:

> "A parochial refusal by the courts of one country to enforce an international arbitration agreement would not only frustrate these purposes, but would invite unseemly and mutually destructive jockeying by the parties to secure tactical litigation advantages."

This is precisely what happened here. A parochial refusal by the Fourth Circuit courts to review arbitration awards invited unseemly jockeying to secure tactical litigation advantages.[7]

This is precisely why the Supreme Court should review cases where the Circuits conflict, and then resolve the conflicts.

CONCLUSION

The Fourth Circuit's refusal to vacate, modify or remand an arbitration award which employed a remedial standard materially different from what the parties agreed to in their contract violated their obligation to apply the review standards of the FAA and United Steelworkers of America v. Enterprise Wheel & Car Corporation, supra, and should be reversed. In addition, the Fourth Circuit easily located the "evident material misdescription" in the arbitrator's award, but refused to apply Sections 10 and 11 of the Federal Arbitration Act.

Finally, the Fourth Circuit's taking jurisdiction and venue, contrary to the simple language of Sections 10 and 11 of the FAA, deprived U. S. Supply of its right to subpoena information for a review hearing and hence, materially undercut the review protection the FAA gives U. S. Supply.

The Fourth Circuit's stance negating arbitration review conflicts with other circuits and the case law of the Supreme Court. Their position materially jeopardizes the rights of parties to arbitration agreements, and in cases like this one, results in a denial of fundamental fairness, because arbitration review must be available to correct blatant errors of law or

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[7] Or perhaps the review petition was submitted to a forum hostile to the interests of one of the parties or unfamiliar with the problem area involved. Apex is a Maryland business, and U. S. Supply is from Pennsylvania; also, the district court judges in the Southern District of Maryland are less likely to be familiar with the significance of FIFO, LIFO and "inventory turns" valuation formulae than urban judges, who probably see commercial transactions more frequently.

fact, and the process tools should be likewise available. Where, as here, no one contests that the arbitrator unlawfully founded his award on obsolete inventory over a year old, and this error went to the heart of the parties's dispute ("material"), the Fourth Circuit's refusal to vacate nullifies the review provisions of the Federal Arbitration Act, and violates basic tenets in the administration of the justice system. Petitioner respectfully requests that this Court grant certiorari and reverse, citing United Steelworkers of America v. Enterprise Wheel & Car Corp., supra, and the other cases cited by U. S. Supply.

Date: 7-24-98

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PUBLISHED
UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

APEX PLUMBING SUPPLY, INCORPORATED;
HAROLD FALCHICK,

Plaintiffs-Appellees,

v.

U.S. SUPPLY COMPANY, INCORPORATED,

Defendant-Appellant.

No. 97-1368

Appeal from the United States District Court
for the District of Maryland, at Greenbelt.
Alexander Williams, Jr., District Judge.
(CA-96-3362-AW)

Argued: December 1, 1997
Decided: April 22, 1998
Entered April 22, 1998

Before WILKINSON, Chief Judge, JONES,
United States District Judge
for the Western District of Virginia, sitting by designation,
and MICHAEL, Senior United States District Judge
for theWestern District of Virginia, sitting by designation.

Affirmed by published opinion. Senior Judge Michael wrote the opinion, in which Chief Judge Wilkinson and Judge Jones joined.

COUNSEL

ARGUED: C. George Milner, C. GEORGE MILNER, P.C., Philadelphia, Pennsylvania, for Appellant. Philip Scott Friedman, IFSHIN & FRIEDMAN, Washington, D.C., for Appellees. **ON BRIEF:** Gary S. Marx, David Kantrow, MARX & FRAME, Washington, D.C., forAppellees.

OPINION

MICHAEL, Senior District Judge:

In this case we consider appeals from the district court's confirmation of an arbitration award. Here, we decide whether, in an action seeking enforcement of such an award, the Federal Arbitration Act confers permissive or mandatory venue on Federal courts in and for the district in which the award was made. As well, we decide whether, in this case, the district court erred in confirming the award. For the reasons stated herein, we affirm the district court.

I. FACTUAL AND PROCEDURAL BACKGROUND

In December 1994, appellant U.S. Supply ("U.S.") and appellee Apex Plumbing Supply ("Apex") entered into a Management Agreement ("Agreement"). In the Agreement, Apex, a Maryland corporation, gave U.S., a Pennsylvania corporation, the right to manage Apex for a renewable, one-year period, as well as an option to purchase Apex after six months. The Agreement stated that a purchase price would be determined using a specific formula in which, inter alia, inventory would be valued based on how recently it was acquired (i.e. the more recent the acquisition, the higher the relative value), and that in any case inventory more than a year old would be given no value. Joint Appendix ("JA") at 334. In addition, the Agreement required the parties to submit any dispute to arbitration by the American Arbitration Association

of Philadelphia, Pennsylvania, and to enter any award made by the arbitrator "in the Court of General Jurisdiction as a judgement of such court." JA at 338.

In its management role, U.S., per the Agreement, underwote Apex's expenses. As a result, in January 1995, Apex gave a security interest in inventory, receivables, fixtures, leasehold rights, and equipment to U.S. JA at 287. Harold Falchick, president of Apex, guaranteed Apex's debt to U.S. JA at 344-45.

Near the end of its first year managing Apex, U.S. exercised the option to buy Apex. Prior to this time, however, Apex had become dissatisfied with U.S.'s performance of its duties under the Agreement, and a dispute arose as to how the purchase price should be determined. As a result of the disagreement, U.S. filed for arbitration.

After receiving testimony and other evidence at a hearing, an arbitrator made an award of $179,284 to Apex. The arbitrator based this award on the following calculations: first, the arbitrator credited to Apex $9,000, the amount received by U.S. from an auction of Apex inventory, as well as $45,725 in accounts receivable collected by Apex, for a total of $54,725. Then, the arbitrator valued Apex's inventory on April 24, 1996 (the last day Apex was in business) at $258,446, and gave an additional credit of $25,219 to Apex for trade fixtures, goodwill, unpaid rent, and unpaid salaries, for a total of $283,665. The arbitrator finally took this figure and subtracted from it the amount owed by Apex to U.S. ($104,381) to reach the $179,284 owed by U.S. to Apex.

U.S. filed a petition to vacate the award in the Court of Common Pleas of Montgomery County, Pennsylvania. Apex removed the action to the United States District Court for the Eastern District of Pennsylvania. Apex then filed a petition to modify or confirm the award in the United States District Court for the District of Maryland. U.S. filed a motion objecting to venue in Maryland, but that motion was denied. The Maryland district court confirmed the arbitrator's award. The Pennsylvania district court then dismissed all proceedings

without prejudice. This appeal followed.

II. DISCUSSION

U.S. challenges one major aspect of the arbitrator's ultimate award. At the arbitration hearing, U.S. had claimed that the value of Apex's inventory on April 24, 1996 was $52,199 and Apex, using a "computer run" from 1995, had claimed that the value, instead, was $408,821.71. According to U.S., the arbitrator's calculation of inventory was higher substantially than its figure because the arbitrator failed to deduct the value of all inventory over one year old. In addition, U.S. raises the threshold issue of whether venue in the U.S. District Court for the District of Maryland was proper to begin with such that the confirmation action even could be heard. We address the issues in reverse order.

A. Venue under the Federal Arbitration Act

Section nine of the Federal Arbitration Act ("FAA"), the statute's venue provision, states, in pertinent part:

> If the parties in their agreement have agreed that a judgment of the court shall be entered upon the award made pursuant to the arbitration, and shall specify the court, then . . . any party to the arbitration may apply to the court so specified for an order confirming the award, and thereupon the court must grant such an order unless the award is vacated, modified, or corrected as prescribed in sections 10 and 11 of this title. If no court is specified in the agreement of the parties, then such application may be made to the United States court in and for the district within which such award was made . . . .

9 U.S.C. § 9 (emphasis added).

The appellant contends now, as it did below, that the Maryland district court lacked proper venue to hear the appellees' confirmation petition. Rather, it argues, the U.S. District Court for the Eastern District of Pennsylvania should have been the exclusive Federal forum under the FAA because section nine mandates that a party bring any confirmation action in the district court in the district where the arbitration occurred. Because, again, Philadelphia served as the situs of the arbitration, exclusive venue would vest in a Pennsylvania district court under U.S.'s reading of section nine. Apex, on the other hand, insists that the statute means what it says--that a party "may" not only choose to confirm an award in the local U.S. district court, but in any other district court that has subject matter and personal jurisdiction. In any district court meeting the jurisdictional requirements, venue is permissive under section nine, Apex concludes. The court below read the statute as Apex does and concluded that the FAA's venue provision conferred upon it permissive, not mandatory, venue.[1] Apex Plumbing Supply, Inc., et al. v. U.S. Supply Co., Inc., Civil No. AW-96-3362, Memorandum Opinion at 3-6 (D.Md. January 14, 1997) ("Mem. Op."). JA at 863-66.

To begin our analysis, we agree fully with the finding of the district court that, looking at the Agreement, ". . . it is undisputed that no particular court was specified where confirmation of the award could be sought." Mem. Op. at 3. JA at 863. The Agreement's choice of law provision did specify that Pennsylvania law would apply to certain arbitration matters,[2] but it in no way designated any one court as the

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[1] We review this conclusion as to venue, like legal conclusions generally, de novo. United States v. Newsom, 9 F.3d 337, 338 (4th Cir. 1993).

[2] Paragraph nine of the Agreement states, more fully, "The conduct of the arbitration proceedings shall include the right to discovery in accordance with the rules and principles set forth in the Pennsylvania Rules of Civil Procedure." JA at 338.

exclusive forum in which a party could confirm an arbitration decision. Thus, because the parties themselves agreed to no particular forum, we address now whether the FAA confers permissive or mandatory venue on district courts to hear confirmation petitions when it states, "If no court is specified in the agreement of the parties, then such application may be made to the United States court in and for the district within which such award was made." 9 U.S.C. § 9.

The issue is one of first impression in this circuit. While the circuits currently are split on the question (i.e., whether, in the absence of an agreement by the parties, a confirmation action must be brought in the district in which the arbitration award was rendered or merely can be brought there), a majority of the circuits interpret section nine's venue provision as permissive. See, e.g., Smiga v. Dean Witter Reynolds, Inc., 766 F.2d 698 (2d Cir. 1985), cert. denied, 475 U.S. 1067 (1986) (permissive); In Re VMS Securities Litigation, 21 F.3d 139 (7th Cir. 1994) (permissive); but see Sunshine Beauty Supplies, Inc. v. United States District Court for the Central District of California, 872 F.2d 310, 312 (9th Cir. 1989) (mandatory). Additionally, two district courts within this circuit, excluding the court in the decision below, have had occasion to interpret section nine; both have held that it confers permissive, rather than mandatory, venue on district courts with the requisite subject matter and personal jurisdiction. U.S. for Kirchdorfer v. Aegis/Zublin Joint Venture , 869 F.Supp. 387 (E.D.Va. 1994) (holding that section nine does not limit confirmation of an award to the district court in the district of arbitration and confirmed a New York arbitration over whose parties the court had personal jurisdiction); Amalgamated Clothing and Textile Workers Union v. Federation of Union Reps., 664 F.Supp. 995 (S.D.W.Va.1987) (venue under section nine is permissive rather than exclusive).

Because there exists no binding precedent in this circuit, we look, first, to persuasive authority from our sister circuits. The Seventh Circuit undertook a particularly thorough examination of the question in In Re VMS Securities

Litigation, supra. There, the court held that the venue provision of the FAA indeed is permissive. 21 F.3d at 145. The court looked to the express language of section nine and reasoned that ". . . in other statutes which restrict venue with so-called 'special venue provisions', Congress has usually employed more explicit language than that used in the FAA." Id. at 144. Noting that "'[o]rdinary canons of statutory construction suggest that Congress would have used stronger language . . . if the intention was to restrict the power of the federal court in Arbitration Act cases[,]'" the court then cited several statutes with mandatory venue provisions. Id. (quoting Smiga, supra, 766 F.2d at 707). First, the Miller Act, 40 U.S.C. § 270b(b), states with respect to venue, "Every suit instituted under this section shall be brought . . . in the United States District Court for any district in which the contract was to be performed and executed and not elsewhere . . . ." Id. at n.3. Similarly, the Clean Air Act, 42 U.S.C. § 7604(c)(1), declares, "Any action . . . may be brought only in the judicial district in which such sources are located." Id. Comparing the venue language of the several statutes, we join the conclusion of the Seventh Circuit that ". . . it is apparent that the FAA is not as explicit as the statutes which unequivocally restrict venue." Id.

Next, we look to a prior case in which, as Apex correctly notes,[3] we held that the word "may" in section nine of the FAA is permissive, rather than mandatory, with respect to the time limit for the confirmation of an arbitration award. Sverdrup v. WHC Constructors, Inc., 989 F.2d 148, 156 (4th Cir. 1993). We held that in providing that at any time within one year after an arbitration award, any party thereto "may" petition court for a confirmation order, section nine was a permissive provision. Id. We reasoned that"[t]he word 'may' in a statute normally confers a discretionary power, not a mandatory power, unless the legislative intent, as evidenced by the legislative history, evidences a contrary purpose." Id. at

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[3] Appellee's Brief at 15-16.

151 (citing Dalton v. United States, 816 F.2d 971, 973 (4th Cir. 1987) (citing United Hospital Center, Inc. v. Richardson, 757 F.2d 1445, 1453 (4th Cir. 1985)). Looking behind that language to determine Congressional intent, we next found that ". . . Congress understood the plain meaning of 'may' to be permissive. Section 9 of the FAA states that any party 'may apply' for a confirmation order but the court 'must grant' the order absent a modification or vacation under §§ 10 or 11." Id. (quoting 9 U.S.C. § 9).

Looking to section nine's venue provision, here, too, Congress could not have understood the plain meaning of "may" to be anything other than permissive. Had Congress intended to restrict venue under section nine to "the United States court in and for the district within which such award was made," it simply would have stated that the parties "must," not "may," bring a confirmation action there. Again, section nine's drafters knew well the distinction between the two verbs; they chose "must" to communicate the compulsory command elsewhere in section nine that ". . . the court must grant such an order unless the award is vacated, modified, or corrected . . . ." 9 U.S.C. § 9.

For all of these reasons, we hold that section nine of the FAA confers permissive, rather than mandatory, venue upon district courts in and for the district in which an arbitration award was made. In the case below, because the Maryland district court possessed subject matter and personal jurisdiction over the parties' confirmation petition, venue was lodged properly in that court.

B. Valuation of Inventory Over One Year Old

U.S. maintains here, as its accountants did at the arbitration hearing, that the arbitrator included inventory over one year old in its valuation of Apex's entire inventory. As U.S. points out, such an action, if true, would be in contravention of the clear terms of sale laid out in the "Option to Purchase" section of the Agreement. See JA at 334. U.S.

claims that, because the arbitrator went outside of the management agreement in making his calculations, the arbitration award should have been vacated or modified below.

Apex does not dispute the allegation that the arbitrator included dated inventory in his valuation. Instead, Apex argues that U.S. should not be able to challenge the arbitrator's calculation methodology this late in the proceedings. Citing United Food and Commercial Workers v. Marval Poultry, 876 F.2d 346, 351 (4th Cir. 1989), Apex states that "where the challenge to an award does not go to the arbitrator's fundamental power but instead involves the merit of an arbitration award, the challenge must be considered presumptively unjustified." Appellee's Brief at 21.

Apex is correct in an important respect. Review of an arbitrator's award is severely circumscribed. Indeed, the scope of review of an arbitrator's valuation decision is among the narrowest known at law[4] because to allow full scrutiny of such awards would frustrate the purpose of having arbitration at all--the quick resolution of disputes and the avoidance of the expense and delay associated with litigation. Jih v. Long & Foster Real Estate, Inc., 800 F. Supp. 312, 317 (D.Md. 1992). Federal courts may vacate an arbitration award only upon a showing of one of the grounds listed in the Federal Arbitration Act, or if the arbitrator acted in manifest disregard of law. In re A.H. Robins Co., Inc., 197 B.R. 513, 516 (E.D.Va. 1994).[5]

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[4] Courts of Appeals are precluded from engaging in de novo review of a confirmation of an arbitration award. Parsons & Whittemore v. Yeargin Const. Co., Inc., 744 F.2d 1482, 1484 (11th Cir. 1984).

[5] This narrow standard of review is necessary to preserve the benefits of arbitration, to wit, reduced delay and expense, and to prevent arbitration from becoming a preliminary step to judicial resolution. Elier Mfg., Inc. v. Kowin Development Corp., 14 F.3d 1250 (7th Cir.), cert. denied, ___ U.S. ___, 114 S.Ct. 2675 (1994). Moreover, Courts of Appeals do not review the reasoning of arbitrators in determining whether their work draws its essence from the contract, but look only to the result reached; the single question is whether the award, however arrived at, is rationally inferable from the contract. Anderman/Smith Operating Co. v.

The FAA provides, in pertinent part, that:

> (a) In any of the following cases the United States court in and for the district wherein the award was made may make an order vacating the award upon the application of any party to the arbitration--
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> . . .
>
> (4) Where the arbitrators exceeded their powers, or so imperfectly executed them that a mutual, final, and definite award upon the subject matter submitted was not made.
>
> . . .

9 U.S.C. § 10(a). Section 11 of the FAA similarly allows modification of an arbitrator's award only in limited instances including, as U.S. argues here, "[w]here there was an evident miscalculation of figures or an evident material mistake in the description of any person, thing, or property referred to in the award." 9 U.S.C. § 11(a).

The appellant argues that both such errors were present maintaining that the arbitrator (1) exceeded his powers by valuing inventory that is expressly to be valueless in the Agreement and, thereby, (2) performed an evident miscalculation of the inventory figures as part of the total award. This argument, however, is not supported by courts in this or other circuits which have held that "as a matter of law" neither misinterpretation of a contract nor an error of law

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Tennessee Gas Pipeline Co., 918 F.2d 1215 (5th Cir. 1990), cert. denied, 501 U.S. 1206 (1991). An arbitration award will not be set aside unless it is irrational or evidences manifest disregard for law. Upshur Coal Corp. v. United Mine Workers of America, Dist. 31, 933 F.2d 225, 229 (4th Cir. 1991).

"constitutes a ground on which an award can be vacated." Farkas v. Receivable Financing Corp., 806 F. Supp. 84, 87 (E.D.Va. 1992) (citations omitted). Indeed, "a conclusion reached by the [arbitrator], even if questionable . . . does not constitute exceeding [his] power." Kirchdorfer, supra, 869 F. Supp. at 392.

U.S., not unexpectedly, counters that here more than a mere "misinterpretation" of the contract has transpired because the arbitrator's valuation decision irrationally disregarded an unambiguous provision of the Agreement. Even if we were to accept the premise of U.S.'s assertion, however, no precedent supports vacation on this ground; indeed, U.S. cites none. To the contrary, authority interpreting the FAA has held that merely because an arbitrator's decision is not based on an agreement's express terms does not mean that it is not properly derived from the agreement; neither misapplication of principles of contractual interpretation nor erroneous interpretation of the agreement in question constitutes grounds for vacating an award. See, e.g., Harry Hoffman Printing, Inc. v. Graphic Communications Intern. Union, Local 261, 950 F.2d 95 (2d Cir. 1991). Far from acting "irrationally," the entire record indicates that the arbitrator relied on, among other evidence, the expert testimony of a certified publicaccountant on the question of inventory valuation. JA at 606, 805, 889.

Again, U.S. also urges that the arbitrator's award be modified pursuant to 9 U.S.C. § 11(a) because the award owed to an evident miscalculation of the inventory figures. As to this proposed remedy, courts have held generally that even a mistake of fact or misinterpretation of law by an arbitrator provides insufficient grounds for the modification of an award. See Amicizia Societa Navegazione v. Chilean Nitrate and Iodine Sales Corp., 274 F.2d 805 (2d Cir. 1960). As the district court stated on this point:

> [C]ourts have construed literally the language of Section 11, relating to miscalculation of figures or misdescription of property as a

> ground for modification of an arbitration award. . . . Where no mathematical error appears on the face of the award . . . an arbitration award will not be altered

Apex Plumbing Supply, Inc., et al. v. U.S. Supply Co., Civil No. AW-96-3362, Memorandum Opinion at 5 (D.Md. February 24, 1997) (citing Hough v. Merrill Lynch, Pierce, Fenner & Smith, 757 F.Supp. 283, 288 (S.D.N.Y. 1991)). JA at 905. Here, because even if the claimed miscalculation of the inventory's value constituted a "material mistake," the miscalculation was not "evident" because it did not appear on the face of the arbitration award. Hough, 757 F.Supp. at 288. Thus, as the district court correctly determined, U.S. did not meet its burden under section eleven in order to modify the award.

Accordingly, we hold that because the appellant failed to qualify under any ground listed in either section ten or eleven of the FAA allowing the vacation or modification of an arbitration award, the district court properly confirmed that award.

III.

For the foregoing reasons, the district court's confirmation of the arbitrator's award in this case hereby is

AFFIRMED.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

APEX PLUMBING SUPPLY, INC.
and
HAROLD FALCHICK

Plaintiffs,

v.

U.S. SUPPLY CO.

Defendants.

Civil No. AW-96-3362

Entered: February 20, 1997

MEMORANDUM OPINION

This action involves challenges by both Plaintiffs Apex Plumbing Supply, Inc. and Harold Falchick, and Defendant U.S. Supply, Co. Inc. to an arbitration award resolving a contractual dispute between the parties. The action is presently before the Court on cross motions. Plaintiffs petitioned this Court, pursuant to the Federal Arbitration Act, 9 U.S.C.A. §§9 and 11, to modify or, in the alternative, confirm the arbitration award. Then Defendant moved to modify, on separate grounds, or vacate the arbitration award, pursuant to 9 U.S.C.A. §§10 and 11 of the Federal Arbitration Act. No hearing is deemed necessary. Local Rule 105.5 (D. Md). For the reasons stated below, the Court will grant Plaintiffs' Petition to Confirm the Award, and deny Plaintiffs' Petition to Modify the Award. As to Defendant's Petition to Modify or Vacate the Arbitration Award, the Court will deny this motion.

I. BACKGROUND

On December 9, 1994, Plaintiffs, Apex Plumbing Supply and Harold Falchick, entered into a contractual agreement with Defendant, U.S. Supply Co., Inc., in which Defendants agreed to manage the wholesale plumbing and heating supply company of Apex. The Agreement further provided the Defendant with an option to purchase Apex Plumbing Supply, and an obligation to lease Apex's building for five years. Defendant exercised its option to purchase Apex, but negotiations failed between the parties. In accordance with the arbitration clause in the Agreement, the parties submitted their dispute to arbitration before the American Arbitration Association.

The Arbitrator conducted two days of hearings, in which both parties presented evidence and testimony on the matter. On September 26, 1996, the American Arbitration Association issued the Arbitrator's Findings of Fact and the Award (Case No. 14 199 00080 96 C/K - before Frederick Kempin, Esq., the Arbitrator) directing Defendant to pay $179,284.00 to Plaintiffs.

On or about January 6, 1997, the Plaintiffs filed the instant action to modify, or in the alternative, confirm the arbitration award so as to: (1) correct a calculation error relating to the square footage of the facility Defendant was to lease; (2) include an award of attorney's fees; and (3) address a discrepancy between the amount of damages awarded. Defendant then moved to modify or vacate the award. Defendant argues that: (1) the Arbitrator made a finding in manifest disregard of the facts; and (2) the Arbitrator made a finding in manifest disregard of the law.

I. DISCUSSION

A. The Standards for Confirmation, Vacation, or Modification of an Arbitration Award

Sections 9 through 11 of the Federal Arbitration Act (the "Act"), set forth the governing standards to be applied in a proceeding to confirm, vacate, or modify an arbitration award. Any party to the arbitration may apply to the court for an order confirming the award, and thereupon the court must grant such an order unless the award is vacated, modified, or corrected as prescribed in Sections 10 and 11 of the Act. Confirmation of an arbitration award is a summary proceeding that merely makes what is already as final arbitration award a judgment of the court. Barbier v. Shearson Lehman Hutton, Inc., 752 F.Supp. 151, 159 (S.D.N.Y. 1990), appeal stayed 943 F.2d 249, aff'd in part, rev'd in part on other grounds 948 F.2d 117; See also Taylor v. Nelson, 788 F.2d 220, 225 (4th Cir. 1986). Exceptions to confirmation of an arbitration award under the Act are strictly limited to avoid frustrating the fundamental purpose of arbitration - quick resolution of disputes, and the avoidance of the expense and delay associated with litigation. Jih v. Long & Foster Real Estate, Inc., 800 F.Supp. 312, 317 (D. Md. 1992).

However, upon application of any party to the arbitration, the court may make an order vacating the award. 9 U.S.C.A. §10. Section 10 enumerates the grounds in which an arbitration award may be vacated. Those include: (1) where the award was procured by corruption, fraud, or undue means; (2) where there was evident partiality in the arbitrators; (3) where the arbitrators were guilty of misconduct by which the rights of any party have been prejudiced; and (4) where the arbitrators exceeded their powers, or so imperfectly executed them that a mutual, final and definite award upon the subject matter submitted was not made. 9 U.S.C.A. §10. Only if at least one of the grounds

specified in Section 10 of the Act is found to exist will the court entertain a petition to vacate an arbitration award. Barbier v. Shearson Lehman Hutton, Inc., 948 F.2d 117, 120 (2nd Cir. 1991). Notwithstanding these circumstances, judicial review of arbitration awards is narrowly limited, and such an award will not be set aside unless it is completely irrational or evidence a manifest disregard for the law. Upshur Coal Corp. v. United Workers of America, Dist. 31, 933 F.2d 225, 229 (4th Cir. 1991); Lee v. Chica, 983 F.2d 883, 885 (8th Cir. 1993).

For an arbitration award to be modified or corrected by the court, the moving party must establish at least one or more of the grounds set forth in Section 11. U.S. Postal Service v. American Postal Workers Union, 564 F. Supp. 545, 551 (1983); Diapulse Corp. of America v. Carba, Ltd., 626 F.2d 1108, 1110 (2nd Cir. 1980). That section provides that an arbitration award may be modified only: (1) where an evident material miscalculation of figures, or material mistake in the description of any person, thing, or property referred in the award; (2) where the arbitrators have awarded upon a matter not submitted to them, unless it is a matter not affecting the merits of the decision upon the matter submitted; and (3) where the award is imperfect in matter of form not affecting the merits of the controversy. 9 U.S.C.A. §11.

B. Plaintiff's Petition to Modify, or in the Alternative, Confirm the Award

Plaintiffs allege that the arbitrator made an evident material mistake as to the Apex facility's square footage referred to in the award, which resulted in an miscalculation of the award granted. Plaintiffs maintain that the arbitrator arrived at the $48,000 award by multiplying 12,000 square feet by $4.00 per square foot when, according to Plaintiff the facility was actually 17,000 square feet. As such, Plaintiffs request the award to be changed to $68,000 (17,000 square

feet multiplied by $4.00). However, Plaintiffs fail to allege any material mistake or miscalculation of the type that would support a modification for two reasons. First, courts have construed literally the language of Section 11, relating to miscalculation of figures or misdescription of property as a ground for modification of an arbitration award, to require the infirmities to appear on the face of the award. See Hough v. Merrill Lynch, Pierce, Fenner & Smith, 757 F.Supp. 283, 288 (S.D.N.Y. 1991). Where no mathematical error appears on the face of the award, or the mistake in the description of the property is not evident nor can be clearly inferred, an arbitration award will not be altered. Id. The award and the arbitrator's findings of fact in the instant matter do not contain any evident miscalculations, or incorrect descriptions of the property, and in fact the award does not contain any calculations or references to the square footage of the property at all, but merely provides for payment of a stated sum to Plaintiffs.[1] Second, Defendant contends that the arbitrator legitimately based his calculations on 12,000 square feet, rather than the entire 17,000 square feet, because Defendant allegedly was only able to use 12,000 square feet of the property. A cursory review of the record shows that the property was actually 17,000 square feet, as Plaintiffs claim, yet the record also provides several references made by Mr. Hyman, owner of Defendant U.S. Supply Co., that they only utilized

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[1] The arbitrator's decision reads, in pertinent part:

FINDINGS OF FACT

5. The rental value in 1996 of that property was $48,000.00 per year. APEX has negotiated with a prospective tenant at $48,000 per year, thus attempting to mitigate damages. If a five year lease was entered into at a rate of $48,000.00, mitigation will have been completed and no damage due.

approximately 12,000 square feet of the facility.[2] Despite the lack of any explanation, as long as an arbitrator's award could be rationally inferred from the record, and in this case it can, a court should not overturn the decision. Valentine Sugars, Inc. v. Donau Corporation, 981 F.2d 210, 214 (5th Cir. 1993); See also Kurt Orban Co. v. Angeles Metal Systems, 573 F.2d 739, 740 (2nd Cir. 1978) (the court refused to look beyond the lump-sum award in an attempt to analyze the reasoning process of the arbitrator).

Plaintiffs also claim that the Arbitrator failed to include attorneys' fees in the Award. This Court is not compelled to address the issue of attorneys' fees when the Arbitrator considered the matter, and decided not to grant them. Finally, Plaintiffs have requested attorneys' fees in connection with the proceedings before this Court. This request is denied, and each party shall be responsible for their own respective attorneys' fees.

Accordingly, this court will deny Plaintiff's Petition to Modify the Award, and grant the Petition to Confirm the Award.

C. Defendant's Petition to Modify or Vacate the Award

The scope of the court's review of the arbitration award is extremely limited, and will not be reviewed de novo. Parson Whittemore v. Yeargin Const. Co., Inc., 744 F.2d 1482, 1484 (11th Cir. 1984). Accordingly, courts will not disturb an arbitrator's factual findings, contract interpretation, or choice of remedies, unless there is a manifest disregard of the law. Van Waters & Roger, Inc. v. Local Union 70, 913 F.2d 736, 739 (9th Cir. 1990). A manifest disregard of the law implies that the arbitrator correctly states and appreciates the clear governing legal principle, but decides to ignore or pay no attention to it.

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[2] See pp. 45, 46, 53, and 54 of the Arbitration Transcripts.

Carte Blanche (Singapore) Pte., Ltd. v. Carte Blanche Intern, Ltd., 888 F.2d 260, 265 (2nd Cir. 1989). In the present case, Defendant has made a number of allegations regarding the arbitrator's award, which Defendant claims evidence a manifest disregard of the law and facts, and justifies this Court to modify or vacate the award. Defendant has cited excerpts of testimony from the arbitration hearings, and submitted various financial documents in an effort to convince the Court of its position, yet failed to present any persuasive evidence that the arbitrator manifestly disregarded the law.

As to Defendant's factual allegations, once again, this Court will not engage in relitigating the merits of this case - an endeavor that would defeat the entire purpose of arbitration. Absent one of the specific grounds in §10 of the Act is found to exists, the Arbitrator's decision must stand. Thus, Defendant's Motion to Modify or Vacate the Award is denied.

A separate Order consistent with this Option will follow.

Date: 2/20/97

/s/_____
Alexander Williams, Jr.
United States District Court Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

APEX PLUMBING SUPPLY, INC.
and HAROLD FALCHICK

Plaintiffs,

v.

U.S. SUPPLY CO.

Defendants.

Civil No. AW-96-3362

Entered: February 20, 1997

ORDER

In accordance with the Memorandum Opinion, it is this 20th day of February, 1997 by the United States District Court for the District of Maryland, ORDERED:

1. That the Plaintiffs' Petition to Confirm the Arbitration Award BE, and the same hereby IS, GRANTED;

2. That the Plaintiffs' Petition to Modify the Arbitration Award BE, and the same hereby IS, DENIED.

3. That the Defendant's Petition to Modify or Vacate the Arbitration Award BE, and the same hereby IS, DENIED.

4. That the Clerk of the Court CLOSE this case.

5. That the Clerk of the Court mail copies of this Memorandum Opinion and Order to all counsel of record.

/s/_____
Alexander Williams, Jr.
United States District Court Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND
SOUTHERN DIVISION

APEX PLUMBING SUPPLY, INC., ET AL.

V.

U.S. SUPPLY CO., INC.

CIVIL NO. AW-96-3362

Entered: January 14, 1997

MEMORANDUM OPINION

The present action commenced on October 25, 1996 with the filing by Plaintiffs, Apex Plumbing Supply, Inc. and Harold Falchick, both of Brentwood, Maryland, of a Petition For An Order to Modify Or, In the Alternative, Confirm Arbitration Award. Jurisdiction is invoked pursuant to the Federal Arbitration Act, 9 U.S.C. § 1, et seq., and pursuant to the diversity and venue provisions of 28 U.S.C. §§ 1332 and 1391 (a)(2), respectively. On November 18, 1996 the Defendant, U.S. Supply Co., Inc., filed its reply which, inter alia, challenges the subject matter and venue jurisdiction of this Court. On December 13, 1996 this Court held a telephonic status and scheduling conference with counsel for the parties and directed the parties to submit briefing on the jurisdictional issue. Timely briefs have been submitted and the matter is now ripe for resolution of the jurisdictional challenge.

I. Background

On December 9, 1994 the parties entered into a written contract whereby U.S. Supply Co., Inc., ("U.S.

Supply"), a Pennsylvania corporation, agreed to manage Apex Plumbing Supply, Inc., (Apex), a Maryland corporation. The Agreement also included an option for U.S. Supply to purchase Apex. The Agreement further contained an arbitration clause calling for arbitration in Philadelphia, and the application of Pennsylvania law. Following the exercise by U.S. Supply of its option to purchase Apex, disagreements arose between the parties whereupon the matter went into arbitration in accordance with the Agreement. On September 26, 1996 in Philadelphia the American Arbitration Association issued the Arbitrator's Findings of Fact and the Award (Case No. 14 199 00080 96 C/K – before Frederick Kempin, Esq., the Arbitrator) which ruled in favor of Plaintiffs and directed U.S. Supply to pay Plaintiffs $179,284.00. The litigants (Plaintiffs and Defendant) had separate disagreements with the Arbitrator's decision, however, because there apparently were disputes as to what issues should have been revisited by the Arbitrator, the matter was not reopened and the Award became final. On October 24, 1996 U.S. Supply filed a Petition to Vacate Arbitration in The Court of Common Pleas of Montgomery County, Pennsylvania (U.S. Supply Co., Inc. v. Apex Pluming Supply Co., Inc. – No. 96-18718). That case was removed to the United States District Court for the Eastern District of Pennsylvania and now is pending in that Court. A day later, on October 25, 1996, Plaintiffs filed the present action in this Court to modify or confirm the Award. U.S. Supply now challenges this action here in the United States District Court for the District of Maryland arguing, essentially, that it won the race to the courthouse by filing [first] its Petition to Vacate in the local Pennsylvania Court, that this Court has no subject matter jurisdiction in that the proper jurisdiction for challenging an Arbitration Award under these circumstances vests in the jurisdiction where the award was made, and that this Court should defer the United States Court for the Eastern District of Pennsylvania where the case was removed and where both subject matter and

venue jurisdiction lie. Plaintiffs, on the other hand, maintain that this Court has subject matter jurisdiction to confirm or modify an award based upon diversity of citizenship (including the jurisdictional amount), and that venue is properly asserted here in Maryland.

II. Discussion

Pursuant to 9 U.S.C. § 9 (Federal Arbitration Act), it is provided as follows:

> If the parties in their agreement have agreed that a judgment of the court shall be entered upon the award made pursuant to the arbitration, and shall specify the court then . . .any party to the arbitration may apply to the court so specified for an order confirming the award.... If no court is specified in the agreement of the parties, then such application may be made to the United States court in and for the district within which such award was made.

While the Agreement in this case provided for the application of Pennsylvania law, it is undisputed that no particular court was specified therein where confirmation of the award could be sought. The issue, therefore, is whether the applicable provision set forth in Section 9 of the Act (location where the confirmation order may be applied for) is mandatory or permissive. Stated otherwise, it is mandatory that the order for confirmation be applied for in the United States District Court for the Eastern District of Pennsylvania where the Arbitrator issued the award (Philadelphia), or it is only optional that the order for confirmation be brought there and that it also may be sought in other jurisdictions such as the United States District Court for the District of Maryland where, as in this case, there is otherwise proper subject

matter jurisdiction (i.e. diversity of citizenship and the jurisdictional amount)? The Circuits which have considered this issue appear divided and the Fourth Circuit has yet to address the issue.

Primarily, the Court notes with interest that U.S. Supply filed its Petition to Vacate Arbitration Award in the local state court in Pennsylvania. While that action was technically not an application seeking to confirm the Award, implicit in U.S. Supply's actions (suing in state court) is an apparent belief that there is at least concurrent jurisdiction in the state court to litigate the very issues that were presented before and addressed by the Arbitrator. In what can be viewed as an inconsistent position, U.S. Supply now posits that "Congress intended jurisdiction to be in the District where the award was rendered; in this case that is the Eastern District of Pennsylvania." (See pages 5 & 6 of its Memorandum Of Law on Jurisdictional And Venue Issues). Is U.S. Supply suggesting that venue and subject matter jurisdiction is only in the federal court where its state action was removed or is it suggesting that jurisdiction also vests in the state court or county court where the award was made? The Court is not quite certain of U.S. Supply's position on this point.

Nevertheless, it is axiomatic that whenever courts are confronted with a statute which employs the word "may" as opposed to "shall" and the legislative intent is unclear, invariably there will be differing approaches. Such is the case here. A few courts have held that Section 9 of the Federal Arbitration Act is mandatory and that confirmation of the award must be brought where the award was made. See, Sunshine Beauty Supplies, Inc. v. United States District Court for the Central District of California, 872 F.2d 310, 312 (9th Cir. 1989). On the other hand, there are other courts which having considered the policy and wording of Section 9 (use of the word "may") have concluded that the provision does not restrict venue, and hence, is only permissive. See In Re VMS Securities Litigation, 21 F.3d 139, at 144-145

(7th Cir. 1994); and U.S. For Kirchdorfer v. Aegis/Zublin Joint Venture, 869 F. Supp. 387, 390 (E.D. Va. 1994).

The Court believes that the disputed provision of Section 9 is permissive and that subject matter and venue jurisdiction properly vests in this Court. First, the provision itself permits the parties to agree or to designate what court shall entertain a suit to confirm an arbitration award. Cogent reasons may not always exist so as to exclusively vest venue jurisdiction in the district where the award was made. On the contrary, there may be circumstances where other courts (both federal and state) possess idiosyncratic aspects or more appropriate bases upon which to hear the matter or consider the issues involved. Second, had Congress intended to restrict venue for suits to confirm arbitration awards, it could have easily done so by employing the word "shall" or by using or adding other clearly limiting language similar to many of the specific or "special venue provisions" contained in various several statutes. See generally, the Miller Act, 40 U.S.C. § 270 b (b)(1982) (providing that, "Every suit instituted under this section shall be brought...in the United States District Court for any district in which the contract was to be performed and executed and not elsewhere); the Clean Air Act, 42 U.S.C. § 7604(c) 1 (1982) (providing that any action...may be brought only in the judicial district in which such source is located); and 42 U.S.C. 21 § 2000 e 5 (f)(3).

Third, there are no compelling reasons for this Court [which possess subject matter jurisdiction] to defer the United States District Court for the Eastern District of Pennsylvania. The case is proceeding expeditiously, and should the Court elect to retain its jurisdiction, the matter has already been scheduled for oral argument on January 27, 1997 with reference to the substantive claim. Moreover, the Plaintiffs reside in this District, and a portion of the Arbitrator's Findings addresses matters in and affecting Maryland. Finally, the determining facto is not necessarily, as Defendant argues, who won the race to the courthouse. A

better determinant is whether there are circumstances present which reflect a substantial connection with this forum, and which otherwise justifies this Court retaining its jurisdiction to consider the petition to modify or confirm the award. Inasmuch as this litigation involves issues touching upon and closely related to events in this District, the Court concludes that venue jurisdiction is properly lodged herein.

III. CONCLUSION

For the foregoing reasons, the jurisdictional challenge, therefore, is DENIED. The Court will permit the parties, if they wish, to file supplemental briefs in connection with the substantive claim now set for oral argument on January 27, 1997 at 4:00 p.m. A separate Order consistent with this Memorandum Opinion will be issued.

January 14, 1997
Date

/s/
Alexander Williams, Jr.
United States District Judge

FOR THE DISTRICT OF MARYLAND
SOUTHERN DIVISION

APEX PLUMBING SUPPLY, INC., ET AL.

v.

U.S. SUPPLY CO., INC.

CIVIL NO. AW-96-3362

Entered: January 14, 1997

ORDER

For the reasons set forth in the accompanying Memorandum Opinion dated the 13th day of January 1997, it is this 14th day of January 1997, by the United States District Court For The District Of Maryland (Southern Division),

ORDER:

1. That the jurisdictional challenge raised by the Defendant, U.S. Supply, BE and the same hereby IS DENIED; and

2. That the parties are permitted to file, by January 24, 1997, supplemental briefs in connection with the substantive claim which is scheduled for oral argument on January 27, 1997.

3. That the Clerk of the Court mail a copy of the Memorandum Opinion and Order to all parties of record.

/s/_____
Alexander Williams, Jr.
United States District Judge

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

APEX PLUMBING SUPPLY, INCORPORATED;
HAROLD FALCHICK

Plaintiffs - Appellees

v.

U.S. SUPPLY COMPANY, INCORPORATED

Defendant - Appellant

No. 97-1368
CA-96-3362-AW

Filed: May 19, 1998
Entered: May 19, 1998

On Petition for Rehearing
with Suggestion for Rehearing In Banc

The appellant's petition for rehearing and suggestion for rehearing in banc were submitted to this Court. As no member of this Court or the panel requested a poll on the suggestion for rehearing in banc, and

As the panel considered the petition for rehearing and is of the opinion that it should be denied.

IT IS ORDERED that the petition for rehearing and suggestion for rehearing in banc are denied.

For the Court,

/s/ Patricia S. Connor
CLERK